UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH B. FITZSIMMONS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-312-P-H***
	)	
JOHN J. CALLAHAN,	***)***	
Acting Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal requires the court to determine whether the Commissioner properly considered all of the plaintiff's functional limitations in determining that he was capable of performing work that exists in significant numbers in the national economy. At issue is the hypothetical question posed to a vocational expert, whose answer became the basis for the determination. Because the hypothetical as posed was not adequate, I recommend that the decision of the Commissioner be vacated.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R.

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security John J. Callahan is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 23, 1997 pursuant to Local Rule 16.3(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

§§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found that the plaintiff had not engaged in substantial gainful activity since January 11, 1994, Finding 2, Record p. 31; that he suffered from depression and incontinence, impairments that were severe but nonetheless did not meet or equal any of the impairments listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 3, Record p. 31; that his impairments made him unable to perform his past relevant work as an office cleaner, machine cleaner and mason tender, Finding 6, Record p. 31; but that, despite his impairments, he was capable of making an adjustment to work that exists in significant numbers in the national economy and was, therefore, not disabled, Findings 12-13, Record p. 32. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

Once there had been a determination at step four of the sequential evaluation process that the plaintiff was unable to return to his past relevant work, the burden shifted to the Commissioner to determine whether the plaintiff could perform work available in the national economy. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). To that end, the Administrative Law Judge received

testimony from Diane Herrle, a vocational expert, by posing certain hypothetical questions to her. Record pp. 60-67. Her responses are relevant to the extent that the vocational limitations reflected in the hypotheticals correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs*., 670 F.2d 374, 375 (1st Cir. 1982). "To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions." *Id*.

The assumptions transmitted to the vocational expert in this case involve a 35-year-old person with a seventh-grade education and limited abilities in reading, writing and mathematics, no transferable work skills, and an ability to perform light work with some limitation on his ability to sit, stand and walk. Record pp. 63-64. In framing his hypothetical, the Administrative Law Judge explicitly relied on the June 1994 report of treating physician Betsy Buehrer, D.O., who concluded that the plaintiff cannot lift more than 20 to 25 pounds but "can walk and stand and sit to tolerance." *Id.* at 63, 220. The plaintiff challenges the adequacy of this hypothetical in several respects.

First, the plaintiff contends the Administrative Law Judge should have characterized him as a "slow learner" in the hypothetical, in light of an evaluation conducted in January 1995 by psychologist Frank Luongo, PhD. that described the plaintiff in such terms. *See id.* at 250 (plaintiff a "slow learner who . . . would certainly have had trouble in learning, and engaging in the educational process."). Although the Administrative Law Judge unambiguously rejected Luongo's findings concerning psychological impairments, noting their subjective basis, he acknowledged that the "slow learner" conclusion was based on objective testing. Record pp. 28-29. A fair inference is that the Administrative Law Judge accepted this aspect of Luongo's report. The regulations make

clear that "[a] limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions," may impact negatively on a claimant's residual functional capacity for work. 20 C.F.R. §§ 404.1545(c), 416.945(c). In my opinion, such an impact is reflected here in the Administrative Law Judge's determination for purposes of the hypothetical that the plaintiff had no transferrable work skills and was thus limited to unskilled work, *i.e.*, "work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time." *Id*. at §§ 404.1568(a), 416.968(a).

Next, the plaintiff contends the Administrative Law Judge erred by failing to include in the hypothetical any reference to the plaintiff's personality disorder or depression. For evidence of the former, the plaintiff relies on Luongo's report, which concluded that the plaintiff suffered from a "moderate anti-social personality disorder." Record p. 250. As noted, *supra*, the Administrative Law Judge categorically rejected Luongo's determinations concerning psychological impairments, finding that they were "based . . . on the reports of one who has provided much unreliable testimony concerning his symptoms and limitations," *i.e*., the plaintiff, and lacked corroboration from any treating or examining physician. *Id.* at 29. The decision observes that "Dr. Luongo's opinion's and assessments are based only on one interview with the claimant and only upon the claimant's allegations." *Id.*

A psychologist's report is a medical opinion within the meaning of the applicable regulations. 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). An Administrative Law Judge is "not at liberty to substitute his own impression of an individual's health for uncontroverted medical opinion," *Heggarty*, 947 F.2d at 996 (quoting *Carrillo Marin v. Secretary of Health & Human Servs*., 758 F.2d 14, 16 (1st Cir. 1985)), nor, generally, may he interpret raw medical data, *Manzo-Pizarro v.*

Secretary of Health & Human Servs., 76 F.3d 15, 17 (1st Cir. 1996) (citation omitted). While the Administrative Law Judge is certainly within his sphere of competence in finding the plaintiff's testimony at hearing to be "not entirely credible" in light of the other evidence of record, Record p. 25, it would be inconsistent with the principle articulated in *Heggarty* to permit an Administrative Law Judge to make a similar determination about statements made by the plaintiff to a medical source. That determination was for the psychologist to make, in light of his specialized training and expertise.

At oral argument, the Commissioner suggested that the Administrative Law Judge was simply resolving a conflict between Luongo's findings and other medical evidence of record. *See Irlanda Ortiz v. Secretary of Health & Human Servs*., 955 F.2d 765, 769 (1st Cir. 1991) (Administrative Law Judge may resolve evidentiary conflicts). I have reviewed the medical evidence and find nothing that conflicts with Luongo's diagnosis of a personality disorder. Other health care providers simply did not evaluate the plaintiff's psychological functioning or, in the case of the consultants who reviewed the plaintiff's application prior to the hearing stage, actually corroborate Luongo's findings. Record pp. 82, 97.

When evaluating a mental impairment, the Administrative Law Judge is obligated to follow certain special procedures set forth in the regulations at 20 C.F.R. §§ 404.1520a and 416.920a. This process involves the completion of a standard document known as the Psychiatric Review Technique ("PRT") form. The Administrative Law Judge completed a PRT form in connection with his decision, finding that the plaintiff "often" suffered from deficiencies of concentration, persistence or pace, and that the plaintiff had experienced "repeated" episodes of deterioration and decompensation in work or work-like settings. Record p. 35. The inconsistency between those

findings, and the set of functional limitations presented to the vocational expert in the hypothetical, only underscores why remand is necessary here. The requisite nexus between the hypothetical and the medical evidence is unassailably missing.

The plaintiff makes the same argument concerning his depression. Here, however, I must agree with the Commissioner that the lack of reference to depression in the hypothetical was not error. Although the record reveals that the plaintiff was under treatment with Timothy DeGrinney, M.D. for depression as of 1995, and that the physician's initial prescription of amitryptyline was not successful, as of July 1995 DeGrinney reported that he had put the plaintiff on a different medication and that the plaintiff's mood had improved with violent episodes having abated. Record pp. 275, 287, 292. At the hearing, the plaintiff testified that he had been under treatment for depression for "three or four months," that he had been "thinking about just going out and getting just ended it," and that his lack of funds to continue medical treatment was the reason he was "thinking about going out and blowing [his] brains out." *Id*. at 56, 70. The Administrative Law Judge was entitled to reject these statements as lacking in credibility, given that they conflict with DeGrinney's medical findings. The uncontroverted medical record suggests that any depression suffered by the plaintiff was successfully under treatment as of mid-1995, and it was therefore not error to omit from the hypothetical any references to functional limitations brought on by depression.

The plaintiff appeared at his hearing before the Administrative Law Judge *pro se.* He separately alleges here that a denial of his right to counsel at the hearing stage is also a ground for remand. "[T]he absence of counsel, without more, creates no basis for remand. There must be something extra," in the form of "a showing of unfairness, prejudice or procedural hurdles insurmountable by laymen." *Evangelista v. Secretary of Health & Human Servs*., 826 F.2d 136, 142

(1st Cir. 1987) (citations omitted). Because the decision of the Administrative Law Judge is not supported by substantial evidence in the record for the reasons already stated, it is not necessary to consider whether any of the concerns expressed by the First Circuit in *Evangelista* are implicated.

III. Conclusion

For the foregoing reasons, I recommend that the decision of the Commissioner be **VACATED** and the cause **REMANDED** for proceedings consistent herewith**.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 15th day of July, 1997.

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David M. Cohen
United States Magistrate Judge